



# ABOLITION OF DEATH PENALTY

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In 1967, when the 35<sup>th</sup> Report was presented, only 12 countries had abolished capital punishment for all crimes in all circumstances. Today, 140 (December 2015) countries have abolished the death penalty in law or in practice. 32 Countries (India including) retains the death penalty as punishment under the law of the land.

While the government of India scheduled several executions in 2014 (in 64 cases), none were carried out. Amnesty International recorded that at least 64 new death sentences were imposed for murder and, for the first time since the Criminal Law (Amendment Act) of 2013 came into force, rape by repeat offenders. Information reported by the Death Penalty Research Project of the National Law University in Delhi indicated that 270 people were under the sentence of death and that eight people had their mercy petitions rejected in 2014.

## International Commitments

India is party to International Convention on Civil and Political Rights (ICCPR), whereas India did not signed and complies to the First Optional Protocol to the ICCPR (recognizing jurisdiction of the Human Rights Committee) and Second Optional Protocol to ICCPR (towards the abolition of the Death Penalty). The law of India explicitly states that capital punishment may be constitutional. Although, the Constitution provides that India should strive to respect international law and treaty obligations but there's no explicit reference to international human rights obligations.

## Due Process for imposing Death Penalty

Under the ordinary criminal law, all trials involving a possible death sentence are initially held before a District and Sessions Court at State level. Death Sentence imposed in such trials must be reviewed by the High Court of the same State, which has the power to direct further inquiry to be made or additional evidence to be taken upon any point bearing on the guilt or innocence of the defendant. In the High Court, a bench comprising a minimum of two judges must, on appreciation of the facts, come to its own conclusion on guilt and award sentence as deemed fit in the circumstance of the case.

The High Court serves as the first court of appeal for a person sentenced to death, except under some anti-terrorist legislation where the Supreme Court of India is the first appellate court. Where a death sentence has not been imposed by a trial court, the State can appeal to the High Court to enhance the sentence to one of death.

There is no automatic right to appeal to the Supreme Court, except in cases where a High Court has imposed a death sentence while quashing a trial court acquittal. Even where a High Court enhances a trial court's sentence to that of death, there is no automatic right to appeal to the Supreme Court. 'Special leave' to file an appeal with the Supreme Court has to be granted by the High Court or by the Supreme Court itself.

The judicial processes in capital cases come to an end once the higher courts have confirmed the death sentences.

## Provisions of different Indian laws in which the death sentence may be awarded

### Indian Penal Code

- **Sec.121:** Waging, or attempting to wage war, or abetting waging war, against the Government of India
- **Sec.132:** Abetment of mutiny is committed in consequence thereof.
- **Sec.194:** Giving or fabricating false evidence with intent to procure conviction of capital offence- in case if an innocent person be convicted and executed in consequence of such false evidence.
- **Sec.302:** Punishment for murder.
- **Sec.303:** Punishment for murder by life convict.
- **Sec.305:** Abetment of suicide of child or insane person.

- **Sec.307:** Attempt to murder- when any person offending under this section is under sentence for imprisonment for life, he may, if hurt is caused, be punished with death.

### Narcotic Drugs and Psychotropic Substances Act, 1985

- **Sec.31:** A Death Penalty for certain offences after previous convictions.

### Air Force Act, 1950

- **Sec.34:** Offences in relation to the enemy and punishable with death.

### Army Act, 1950

- **Sec.34:** Offences in relation to the enemy and punishable with death.

### Commission of Sati (Prevention) Act, 1987

- **Sec.4:** Abetment of Sati.

## Death Penalty Upheld to be 'Constitutional' by the Supreme Court

As far as death penalty is concerned, the same has been held to be constitutionally valid by the Apex Court in number of cases. For example;

In 1973, the Supreme Court of India upheld the constitutionality of the death penalty for the first time in the case of *Jagmohan Singh v. State of U.P.* (AIR 1973 SC 947). In the same year, a new Code of Criminal Procedure was passed which required judges to note 'special reasons' when imposing death sentences and also required a mandatory pre-sentencing hearing to be held in the trial court. The requirement of such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any 'special reasons' to impose the death penalty.

In 1980, the Supreme Court again upheld the constitutionality of the death penalty in the key case of *Bachan Singh v. State of Punjab* (with 7 other cases). The judgment called for aggravating and mitigating circumstances with reference to both the crime and the convicted prisoner to be considered in passing sentence and emphasized that the death penalty should be used only in the 'rarest of rare' cases.

In a landmark decision, the Bombay High Court ruled on June 16, 2011 in the case *India Harm Reduction Network v. Union of India* that the mandatory death penalty for drug offences was "unconstitutional." While the Court did not strike down Section 31-A of the Narcotic Drugs and Psychotropic Substances Act of 1985, it did state that the courts were no longer obligated to hand down the death penalty for repeat drug offenders under the Act. In March, 2014 the government replaced the mandatory death penalty in the Narcotic Drugs and Psychotropic Substances Act with an optional death sentence.

The Supreme Court ruled in *Bhagwan Das Vs. State* (2011) that the death penalty should be rendered as punishment in cases of "honor killings." The Court reasoned that doing so would send a clear and deterring message to those committing such crimes. "All persons who are planning to perpetuate honor killings should know that the gallows await them," the Court said. The Law Commission of India, however, disagreed with the recent uptick of death sentences handed down in honor killing cases throughout the country following the Supreme Court's ruling. The Commission said that the death penalty should be used to punish the convicted "only in very exceptional and rare cases." The Commission also gave recommendations of its own on how to better handle them in an August 2012 report, including a proposal of a new law that would prohibit caste assemblies that often condemn marriages that lead to honor killings.

In February 2012, the Supreme Court ruled in *State Of Punjab v. Dalbir Singh* that the mandatory death penalty as punishment for crimes stipulated under article 27(3) of the Indian Arms Act of 1959 was unconstitutional in light of judicial review under the Constitution and the judgments in *Bachan Singh v. State of Punjab* and *Mithu v. State of Punjab*. Because the Court ruled against the law, that particular article under the Arms Act is null and void. The courts can now impose a lesser sentence. A bill to further amend the Arms Act article in question was introduced prior to the ruling in December 2011. The bill is currently pending.

Article 21 of the Constitution of India, whilst enshrining the 'right to life', reads: 'No person shall be deprived of his life and personal liberty except according to procedure established by law'. It is the latter half of the Article in which the death penalty is enabled and finds sanctuary. Accordingly, the Supreme Court of India, considering the Constitution of India, regards the use of capital punishment as a legitimate penalty in certain of the most extreme criminal cases. Also, India does not have a provision for mandatory death penalty.

In February 2014, the Indian Supreme Court emphasized the importance of the clemency process for capital inmates and commuted a total of 22 death sentences. The Supreme Court reasoned that undue, inordinate, and unreasonable delay in considering mercy petitions constitutes torture. The Court stated that pursuant to Article 32 of the Constitution, the Supreme Court has the power to commute death sentences into life imprisonment upon undue delay in disposal of mercy petitions. The court also denounced other practices, such as executing individuals with mental illnesses and the use of solitary confinement. In addition, the court determined that the government must carry out post-mortem examinations of executed prisoners to provide the courts with data on the cause of death, which will allow for consideration of whether hanging constitutes cruel and inhuman punishment.

Quoting extensively from international treaties and standards, the Supreme Court stated that the execution of people suffering from mental illness was unconstitutional and ruled that mental disability would be a factor that warranted commutation of a death sentence. The Court also reiterated that solitary confinement of a prisoner on death row was unconstitutional and set guidelines on the treatment of people under sentence of death. According to the guidelines, prisoners on death row should receive legal aid; be informed in writing about the rejection of their mercy petitions; have their mental and physical conditions regularly checked; and be allowed to meet their family members before execution.

Thus, it is crystal clear that Death Sentence has been held constitutional by the Court and therefore awarded of the same cannot be challenged.

#### **The Law Commission of India**

In its 35<sup>th</sup> Report, the Law Commission of India held that need for abolition of capital punishment is not felt in India because Judiciary has already taken care of the issue, and evolved the doctrine of 'Rarest of the Rare' which is meant to confine the provision of death penalty to the cases where dreaded criminals are involved and the sentence of death penalty is awarded with perspective to prevent criminal repeating his crime or deter crime by discouraging would-be offenders and penalty invoked only in the interest of the society at large.

#### **Constitutional compliance to the Covenant**

The article 6 of the International Covenant on Civil and Political Rights, 1966, states about right to seek pardon or commutation of the sentence. This is ensured by the Constitution under Article 72 & 161. Under these provisions the defendant can file a mercy petition with the National or State executive. Under Article 72 & 161 of the Constitution of India, the President of India or the State Governor has the power to grant pardon or commutation of sentence.

These constitutional provisions implicitly allow for a two-tier process of seeking commutation, first from the State Governor and then from the President. The executive also have the power under the Indian Penal Code to commute a death sentence without the consent of the offender.

#### **National Human Rights Commission – INDIA**

The issue was placed before the Commission in its meeting held on 13.9.2001, wherein the Commission discussed in the Agenda item. The Commission did not record any stand in the matter. By awarding the death penalty, one is deprived of life which is a prime and basic human right and in the absence of Right to Life, no other rights can exist.

Even if the death sentence is upheld by the High Court and the Supreme Court, the President of India has been conferred powers to grant pardon and to suspend, remit or commute sentence, as per the provisions under Article 72 of the Constitution of India. Similarly, under Article 161 of the Constitution the Governor of State has been conferred power to grant pardons, reprieves, respites or remissions of punishment or suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive powers of the State extends.